98CV04092-ILG-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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NINA INDART, an infant by her Mother and Natural Guardian, CYNTHIA INDART, and CYNTHIA INDART, individually.

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendants.
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MEMORANDUM AND ORDER
98-CV-4092(ILG)

GLASSER, United States District Judge:

The infant plaintiff Nina Indart was born on June 30, 1996. Her mother and natural guardian, Cynthia Indart, received prenatal care at Sunset Park Family Health Center from January 17, 1996 to the date of birth, and until her release on July 3, 1996. On December 17, 1996 this action was commenced in the Supreme Court of the State of New York, Kings County, against Lutheran Medical Center and three Physicians, "John" Werner, "John" Naddow and "John" Agherbro (the "physician defendants") alleging that their medical malpractice caused injury to Nina. Her mother sues in her capacity as guardian of Nina and individually for the loss of her daughter's services.

On June 8, 1998, the government removed the action to this court pursuant to the Federally Supported Health Centers Act

of 1998, 42 U.S.C. § 233, et seq. More specifically, § 233 provides in substance that the exclusive remedy for damages resulting from the performance of medical functions by an employee of the Public Health Service ("PHS") *acting within the scope of his employment*, shall be in a suit against the United States. 42 U.S.C. § 233(a).

Sections 233(b) and (c) provide in substance that if the Attorney General certifies that the defendant was acting within the scope of his employment when the incident giving rise to the suit occurred, he shall remove the suit from the state court in which it was commenced to the appropriate United States district court and the proceeding shall then be deemed to be governed by the Federal Tort Claims Act ("FTCA").

Section 233 (g) has many subdivisions which will be summarized as follows. An entity (a public or nonprofit entity, § 233(g)(4)) must submit an application to the Secretary of Health and Human Services (the "Secretary") to be deemed an entity for the purposes of this section. § 233(g)(1)(D). The Secretary must then, within 30 days thereafter determine whether the entity or its employees shall be deemed an employee of the PHS for purposes of this section. § 233(g)(1)(E). If approved by

the Secretary, the entity and any of its employees shall be deemed a PHS employee and the remedy against the United States for damages for personal injury resulting from the performance of medical or surgical functions by any PHS employee while acting within the scope of his employment shall be exclusive. § 233(g)(1)(A) and § 233(a).

Section 233(l) provides in substance that the Attorney General shall advise the court as to whether the Secretary has determined that the entity or its employee is deemed to be an employee of the PHS for purposes of this section with respect to the actions or omissions that are the subject of a civil action. Such advice shall be deemed to satisfy the provisions of § 233(c) that the Attorney General certify that an entity or employee of the entity was acting within the scope of their employment.

The government has removed the action from the state court by a Notice of Removal which reads that the case is "being removed to the United States District Court for the Eastern District of New York. The Sunset Park Family Health Center, a division of Lutheran Medical Center, is deemed covered by the Federally Supported Health Centers Act of 1992. 42 U.S.C. § 233 et seq." That Notice, on its face, was on behalf of Lutheran Medical Center only and at oral argument, the government stated

that it was not its purpose or intention to remove the action against the physician defendants to the federal court.[1]

The plaintiff moved this Court for an order that would remand the action to the state court arguing that there is no certification that the physicians named were acting within the scope of their employment at the time of the incident out of which this suit arose as required by § 233(c).

In response to that motion, the government filed a "Certificate of FTCA Coverage and Notice of Substitution of United States as Party Defendant," which reads in pertinent part as follows:

> . . . United States Attorney for the Eastern District of New York, . . . hereby certifies that the Lutheran Medical Center in so far as it operated Sunset Park Family Health Center after December 1, 1994, is covered by the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671, et seq., pursuant to the Federally Supported

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[1] The government's assertion in this regard is inexplicable. The entity, Lutheran Medical Center, cannot itself be guilty of medical malpractice. It will be liable only if it is proved that its employee, acting within the scope of his employment, was guilty of medical malpractice. In addition, § 233 (a) is explicit in providing that the remedy against the United States is exclusive of any other civil action against the employee whose act or omission gave rise to the claim. The obligation of the government to save harmless its employees acting within the scope of their employment in such cases is intrinsic to the Federal Tort Claims Act. See, e.g., 28 U.S.C. § 2679 (b)(1).

> Health Centers Assistance Act of 1992, 42 U.S.C. §§ 233 et seq. The United States Attorney hereby gives notice that the United States has been substituted in as a party defendant. The government also certifies that plaintiff did not file an administrative claim prior to commencing suit.

Based upon the last sentence, the government has cross-moved for an order dismissing the case for the reason that the plaintiffs have failed to exhaust their administrative remedies as required by 28 U.S.C. § 2675(a).

DISCUSSION

The Motion to Remand

Provided the Attorney General has advised the court as to whether the Secretary has determined under §§ 233(g)(1)(A),(D) that the entity or its employee is deemed to be an employee of the PHS with respect to the actions or omissions that are the subject of the civil action, such advice shall be deemed to satisfy the requirement of § 233(c) that the Attorney General certify that the employees were acting within the scope of employment. § 233(l).

Other than the Certification set out above, the Court has not been explicitly advised of the Secretary's determination in accordance with § 233(l). It will indulge the inference from the Certification that the appropriate determination has been

made by the Secretary and hereby directs the government to confirm the validity of that inference within twenty days from the date of this order, failing which and failing the certification required by 28 U.S.C. § 2679 (d)(1), the motion to remand will be granted and is otherwise denied.

Notwithstanding the absence of the physician defendants from the Notice of Removal, the obligation of the government to hold them harmless if acting within the scope of their employment and the remedy against the United States being the exclusive remedy in such case, the action against them is deemed to be removed as well.

The Cross-Motion to Dismiss

28 U.S.C. § 2675 (a) provides, in substance, that the presentation of a claim for personal injuries to the appropriate federal agency and the final denial of that claim is a condition precedent to an action upon a claim against the United States. The plaintiffs having failed to satisfy that condition precedent, the government's motion to dismiss for that reason is hereby granted, without prejudice.

SO ORDERED.

United States District Judge

Dated: Brooklyn, New York
October 6th 1998

Copies of the foregoing Memorandum and Order were this day sent to:

Lawrence A. Breslow, Esq.
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New York, New York 10168-0068

Kevan Cleary
Assistant United States Attorney